No. 80-1025.

In the
Supreme Court of the United States.

OCTOBER TERM, 1980.

HARMASSE LeCLAIR AND ELIZABETH LeCLAIR,
PETITIONERS,

v.

WILLIAM SAUNDERS,
RESPONDENT.

Brief in Opposition to a Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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Opinions Below.

The decision below is reported at 627 F.2d 606 (2d Cir. 1980) and accurately reproduced in the petitioners' jurisdictional statement at A1-A16.

Jurisdiction.

The petitioners have invoked the Court's discretionary jurisdiction under 28 U.S.C. § 1254(1).

Statutory Provisions Involved.

The case does not involve the facial validity of any statute or regulation, but rather a state official's exercise of discretionary authority under a concededly proper regulatory scheme.

Statement of the Case.

A synopsis of the case in the light most favorable to the petitioners appears in the decision of the Court of Appeals at 627 F.2d 606, 607-608. That summary is a more reliable statement of the case than the one proffered in the jurisdictional statement.[1]

Summary of Argument.

The petitioners do not present a substantial federal question. They contend that the Court of Appeals for the Second Circuit does not recognize a claim of selective law enforcement in violation of the Equal Protection Clause by means of chargeable or "objective" bad faith on the part of state officials; and that the circuit courts have divided over that issue (p. 3).

The contention is unfounded because in the present case the Court of Appeals did acknowledge the applicability of a standard of objective bad faith to selective enforcement claims pur-

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[1] In particular, at pages 10-11, petitioners' assertions 3, 4, 6, 7, and 8 are self-serving and should give way to the Court of Appeals' view of the trial record.

sued under 42 U.S.C. § 1983, but found the evidence at trial insufficient for that theory of recovery (pp. 3-6).

Further, the circuit courts are not divided upon that issue. None has rejected a rule of objective bad faith. While the Court of Appeals for the Second Circuit has not found the question necessary for any prior decisions, it has suggested its understanding and approval of such a standard for cases of sufficient evidence (pp. 7-9).

Argument.

The petitioners claim the presence of a significant question of equal protection doctrine dividing the circuits: whether a plaintiff in a 42 U.S.C. § 1983 money damages action alleging discriminatory selective enforcement of state regulatory law must show actual malice, or bad faith, on the part of a defendant state official. They contend that the Court of Appeals here demanded a showing of actual malice or bad faith and excused or ignored the role of those chargeable mentalities (jurisdictional statement at 11, 13-14, 18-19), and that such an approach diverges from the views of two other circuit courts. *Id.* at 16-17. For several reasons the asserted issue is artificial and unworthy of the Court's jurisdiction.

I. In a Personal § 1983 Damages Action of the Present Kind, the Law is Settled that a Defendant Official is Liable for Either Actual or Chargeable Bad Faith; the Court Below Correctly Consulted that Standard.

The present § 1983 lawsuit sought the exclusive remedy of damages against the defendant state dairy farm inspector for

his allegedly selective enforcement of sanitary water regulations against the plaintiff farm owners. Jurisdictional statement A18-A20 (amended complaint). In its analysis of governing doctrine, the Court of Appeals consequently discussed the rules of official immunity under § 1983 and of selective prosecution under the Equal Protection Clause. 627 F.2d at 608-610. On those pages its explication of the leading cases and its appraisal of the evidence demonstrate that it tested the record for sufficient evidence of both actual (subjective) and chargeable (objective) bad faith on the part of the inspector.

For the standard of liability of immunity under § 1983, it consulted the leading decisions of *Scheuer* v. *Rhodes*, 416 U.S. 232, 247-248 (1974), and *Wood* v. *Strickland*, 420 U.S. 308, 319-320 (1975), and quoted extensively from the relevant passages of *Wood*. See 627 F.2d at 609. It observed that

> "an official is not immune from liability for damages under §1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate . . . constitution rights . . .."

It added that *Wood* suggested an inquiry into whether a defendant official

> "has acted with such an impermissible motivation or with such disregard of the [plaintiff's] clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith."

The Court of Appeals concluded:

> *Wood* appears to propose, then, a test containing two independent parts: did the official, with subjective or ob-

> jective knowledge, violate a person's constitutional rights, or did the official act with malicious intent to injure the person in some "unconstitutional" sense? *We think the* Wood *standard of qualified immunity is appropriate for an official operating in appellant's capacity.* (Emphasis supplied.)

Id. at 609.

For a standard of liability under the plaintiff's equal protection theory, the Court looked to cases involving the criminal defense of selective prosecution as a "useful analogy" and concluded, in light of its decisions led by *United States* v. *Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974), that a selective enforcement, equal protection claim should show (1) discriminatory treatment plus (2) bad faith or invidious motivation. The Court summed up:

> Drawing from the above standards articulated in *Moss* and *Berrios as well as from the immunity inquiry outlined in* Wood, we believe that liability in the instant type of equal protection case should depend on proof that (1) the person, compared with others similarly situated, was selectively treated; and (2) that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person. (Footnote and citation omitted; emphasis supplied.)

627 F.2d at 609-610.

These passages demonstrate convincingly that the Court of Appeals had *Wood*'s objective component of liability in mind.[2]

Its treatment of the plaintiff's evidence under the directed verdict standard leads to the same conclusion. The farm owners at trial had advanced six factual hypotheses of malice or bad faith. In the Court's view:

> None of the six elements directly shows malice, and each is too attenuated to provide adequate inferences of it. Taking the evidence in the light most favorable to appellees, and even viewing the six elements collectively, there was no showing that Saunders maliciously or in bad faith wanted to hurt appellees.

627 F.2d at 610.

It is difficult to believe that the Court based this perception upon a one-eyed inspection of the record, examining closely for subjective malice but ignoring evidence of chargeable bad faith, reckless, or arbitrary behavior. The compelling explanation, in light of the Court's awareness of the *Wood* doctrine and the *Moran* decision, *supra* n.2, is that it found the evidence insufficient to warrant application of the objective bad faith standards.

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[2] At the end of the last quoted sentence, the Court cited *Moran* v. *Bench*, 353 F.2d 193, 194 (1st Cir.), *cert. denied*, 384 U.S. 906 (1965), a § 1983 damages action in which the Court of Appeals for the First Circuit applied an objective test for bad faith: "It does not appear that the defendant's acts were beyond their authority, or that their conduct was arbitrary or unreasonable."

Indeed, at one point in their jurisdictional statement, the petitioners seem to acknowledge that the Court of Appeals incorporated *Wood*'s objective bad faith standard. *Id.* at 14.

[3] Consequently in footnote 1, 627 F.2d at 610, the Court remarked, "We leave open the question whether an official who claims that his intent to in-

II. The Court of Appeals for the Second Circuit has not Rejected a Rule of Objective Bad Faith in Selective Prosecution Cases so as to Create a Split of Authority Among the Circuits.

The petitioners' appeal to the Court's discretionary jurisdiction rests upon the thesis that the circuit courts are presently divided in their definitions of unconstitutional selective prosecution. They cite decisions in the Fifth and Seventh Circuits for the proposition that both actual or chargeable bad faith enforcement of civil and criminal law may violate the Equal Protection Clause. Jurisdictional statement at 16-17.[4] They theorize that a different standard controls in the Second Circuit. *Id.* at 17-19. "The [c]ourt required actual malice for the maintenance of an action, and thus even if Saunders acted in objective bad faith under *Wood* v. *Strickland* standards, he would still obtain dismissal." *Id.* at 19.

The proposition is inaccurate. The Court of Appeals for the Second Circuit, as well as those in other circuits cited by petitioners,[5] has never held that chargeable bad faith is insufficient to make out a case of selective prosecution or selective enforcement of civil law.[6] It has not found the issue necessary to

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jure was benign but which under any objective measure would not be found so may be held liable." The Court would not have "left open" such an issue genuinely presented by the evidence.

[4] See *Hawkins* v. *Town of Shaw, Mississippi*, 461 F.2d 1171, 1172-1173 (5th Cir. 1972); *Sangmeister* v. *Woodard*, 565 F.2d 460, 467 (7th Cir. 1977); *Olshock* v. *Village of Skokie*, 541 F.2d 1254, 1260 (7th Cir. 1976); *United States* v. *Falk*, 479 F.2d 616, 624 (7th Cir. 1973); *Weisburg* v. *Powell*, 417 F.2d 388, 392 (7th Cir. 1969).

[5] Jurisdictional statement at 14-15.

[6] To the best of the respondent's research, no circuit court has taken such a position. Rather, as in the decisions cited in the jurisdictional statement at 14-15, the parties have presented, and the courts have decided, the question of actual intent.

the decision of any selective prosecution appeal and has expressly reserved judgment to an appropriate case. The major discussion to that effect appears in *Moss* v. *Hornig*, 314 F.2d 89 (2d Cir. 1963), in which Chief Judge Lumbard noted that the issue remained open whether a mentality short of invidious motives of race and religion or interference with constitutional rights — a motivation such as personal spite — would suffice to state a claim of selective prosecution.[7]

> We are not convinced that the [decision of *Oyler* v. *Boles*, 368 U.S. 448, 456 (1962) dealing with alleged class-based discrimination] precludes our granting relief if a plaintiff can show that a state official purposefully discriminated against him. However, Moss has made no such showing.

Id. at 93.

The intimation that selective prosecution would lie in instances of personal animus suggests also that such individual bad motivation would extend to cases of reckless, high-handed, or arbitrarily official conduct and that proof would inevitably include circumstantial evidence. In *Moss* the plaintiff failed for lack of evidence, not lack of law. The same is true here. Thus the petitioners cannot reasonably argue that the Court of Appeals has set its face against a rule of objective bad faith. At best they can argue that it has not yet found it squarely necessary to adopt the rule. That circumstance does not constitute a conflict of doctrine between the circuits. Nor is it likely to be long-lived. Aside from the suggestiveness of *Moss*, the usual policies favoring objective standards of

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[7] In *Moss* the complainant store owner showed that a local prosecutor had enforced the Sunday closing law in his district on only two occasions over the period of a year.

culpability seem likely to control the definition of selective prosecution in the Second Circuit. As in rules of criminal and tort law, liability will not turn upon purely subjective intent, especially when such a mentality might be utterly unreasonable or misguided in the circumstances. In short, if the Court of Appeals has not already embraced the rule proposed by the petitioners, it seems destined to do so at the first appropriate occasion. In the present case, the Court's analysis made plain that the evidence at trial had not been sufficient to support a claim of objective bad faith. See 627 F.2d at 610 n.1.

Conclusion.

The present case turned upon the sufficiency of the evidence at trial. It does not present a substantial federal question of novelty, difficulty, or divided authority. Consequently the Court should deny the petition for certiorari.

Respectfully submitted,

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